

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**SNL WORKFORCE FREEDOM
ALLIANCE, *et al.*,**

Plaintiffs,

v.

**NATIONAL TECHNOLOGY AND
ENGINEERING SOLUTIONS OF
SANDIA LLC d/b/a SANDIA NAT'L
LABORATORIES, *et al.*,**
Defendants.

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Case No. 1:22-cv-00001-KWR-SCY

**DECLARATION OF TERRY
COOPER IN SUPPORT OF
NATIONAL TECHNOLOGY AND
ENGINEERING SOLUTIONS OF
SANDIA, LLC'S SUPPLEMENTAL
BRIEFING IN SUPPORT OF ITS
MOTION TO DISMISS PLAINTIFFS'
AMENDED COMPLAINT**

DECLARATION OF TERRY COOPER

I, Terry Cooper, hereby declare:

1. I am the Senior Manager Safety, Health and Radiation Protection at National Technology and Engineering Solutions of Sandia, LLC ("NTESS"). I have held this position for three years and I have been employed by NTESS for almost eighteen years. I make this declaration in support of NTESS's Supplemental Brief to Dismiss Count III of Plaintiffs' Complaint. The facts set forth in this declaration I know to be true of my own personal knowledge and upon information and belief. If called to testify in this matter, I could and would competently testify to the matters set forth in this declaration.

2. NTESS is a private Limited Liability Company. NTESS manages and operates Sandia National Laboratories ("SNL") pursuant to Contract No. DE-NA0003525 (hereinafter, "the M&O Contract") that NTESS entered into with the U.S. Department of Energy's ("DOE's") National Nuclear Security Administration ("NNSA"). NTESS manages the day-to-day site operations of SNL in compliance with the M&O Contract.

3. As a federal contractor, NTESS is required to comply with federal regulations applicable to it, many of which are effectuated through the terms of NTESS's M&O contract with the DOE. For example, the M&O Contract provides that the Contracting Officer may, "from time to time and at any time, *unilaterally* modify the Contract to revise, add or delete" Federal Acquisition Regulation ("FAR") or DOE Acquisition Regulation ("DEAR") clauses contained in section H of the M&O contract due to changes in the law or regulations or policy resulting from the approval of new deviations. The Contracting Officer may make unilateral modifications to the M&O Contract if there are changes to the FAR, DEAR, or Section H clauses (Special Contract Requirements) that result from the approval of new deviations to existing FAR, DEAR, or Section H clauses.

4. President Biden created the Safer Workforce Task Force in order to provide the heads of federal agencies ongoing guidance to keep their employees safe during the COVID-19 pandemic. The Safer Federal Workforce Task Force is led by the White House COVID-19 Response Team, the General Services Administration (GSA), and the Office of Personnel Management (OPM).¹

5. In Summer 2021, the Safer Workforce Task Force required that "onsite contractors who are not fully vaccinated or decline to provide their vaccination status must wear a mask, physically distance, comply with a weekly or twice-weekly testing requirement, and are subject to Government-wide restrictions on official travel." Accordingly, the Task Force FAQs required that on-site contractor employees attest to their vaccination status and that those who choose not to respond be treated as unvaccinated. Further, those employees who were not fully vaccinated or who declined to provide information about their vaccination status were required to be part of a serial testing program or submit proof of a negative COVID-19 test from no later than

¹ See <https://www.saferfederalworkforce.gov/> (last visited Sept. 21, 2022).

the previous three days prior to entering a federal building. A copy of the Safer Workforce Task Force Covid-19 Workplace Safety: Agency Model Safety Principles issued July 29, 2021 is attached as **Exhibit A**.

6. On September 9, 2021, President Biden signed Executive Order No. 14042 (“EO”), “Ensuring Adequate COVID Safety Protocols for Federal Contractors.” This EO applies to federal contractors such as NTESS.²

7. On September 24, 2021, the Safer Workforce Task Force issued updated guidance for federal contractors and subcontractors that are covered by the EO that required, among other things, that all covered contractor employees be fully vaccinated by December 8, 2021 unless they were legally entitled to an accommodation.³ It also required covered contractors such as NTESS to ensure that all individuals, including covered contractor employees and visitors, comply with published Centers for Disease Control and Prevention (“CDC”) guidance for masking and physical distancing at a covered contractor workplace.

8. On October 14, 2021, the DOE/NNSA Contracting Officer unilaterally modified NTESS’s contract. This modification requires NTESS to “comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor workplace locations published by the Safer Federal Workforce Task Force,” including physical distancing, masking, and testing requirements, as well as the requirement that all contractor workers be vaccinated against COVID-19. A copy of this Contract Modification, No. 0128, is attached as **Exhibit B**.

² See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/> (last visited Jan. 7, 2022).

³ See <https://www.whitehouse.gov/omb/briefing-room/2021/09/24/new-guidance-on-covid-19-workplace-safety-for-federal-contractors/>, https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf (last visited Jan. 7, 2022).

9. Because NTESS was required to comply with both the EO and its guidance, NTESS announced its intention to institute a vaccination requirement.

10. On December 7, 2021, Judge R. Stan Baker of the U.S. District Court for the Southern District of Georgia issued an injunction halting the enforcement of EO's federal contractor vaccine mandate. The remaining requirements of the Executive Order and the Safer Federal Workforce Task Force guidance remained intact, including serial testing of onsite unvaccinated employees and contractor compliance with masking and distancing direction.

11. On January 5, 2022, NTESS issued a Special Announcement informing the workforce that it was pausing enforcement of the vaccine mandate and would be implementing a serial testing program, consistent with CDC guidance, beginning January 18, 2022. A copy of this announcement is attached as **Exhibit C**.

12. On February 25, 2022, the CDC updated its masking requirements to remove the distinction between unvaccinated and vaccinated persons. Under this new guidance, the CDC now recommends that everyone wear masks when COVID-19 transmission rates in the community are high, and everyone—regardless of vaccination status—may forgo a mask when community spread was medium or low. Consistent with the new CDC guidance, NTESS changed its masking guidance to require masking indoors for all employees regardless of vaccination status when the COVID-19 levels in the immediate community of the Sandia labs are high according to weekly statistics released by the CDC. In those situations, all employees must wear masks in indoor public spaces when they are around other employees. If the COVID-19 levels are low or medium in the community, then masks are not required. Consistent with the requirements of the Americans with Disabilities Act, NTESS maintains a policy and practice of accommodating employees whose disabilities may negatively impact their ability to safely use masks.

13. On July 12, 2022, the EEOC updated its COVID-19 testing guidance. While the EEOC's previous guidance indicated that mandatory workplace COVID-19 testing must always meet the standard that any medical test be "job related and consistent with business necessity," the new guidance indicates that employers must assess several factors to determine whether workplace testing meets this standard. Because NTESS was still required to follow CDC and DOE guidance, which both recommended and required NTESS to serial test unvaccinated employees, NTESS did not modify its serial testing program at this point.

14. On August 11, 2022, the CDC updated its guidance providing that COVID-19 screening testing of asymptomatic people without known exposures will no longer be recommended in most community settings.

15. Because NTESS was no longer required to enforce serial testing as to its unvaccinated employees, NTESS removed this requirement as of August 12, 2022, the day after the CDC announced its new guidance. As of August 12, NTESS no longer requires COVID-19 testing or proof of a negative COVID-19 test for unvaccinated employees who come on-site to an NTESS facility. A copy of a communication to NTESS's employees about these changes is attached as **Exhibit D**.

16. Throughout this pandemic, NTESS has maintained a policy and practice to follow COVID-19-related regulations, guidance and requirements issued by the applicable federal agencies, including the DOE, CDC and EEOC, and I have no reason to believe that NTESS will deviate from that policy and practice. At this time, the Safer Federal Workforce Task Force guidance indicates that the government will take no action to implement or enforce the EO, and NTESS has received no information that would suggest that any of the foregoing agencies would

require NTESS or other federal contractors to reinstitute any of its now-discontinued COVID-19 vaccine, testing or masking policies.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 27, 2022.

A handwritten signature in black ink, appearing to read 'Terry Cooper', with a long horizontal line extending to the right.

Terry Cooper